United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

5-13-77

77-7150

To be argued by
Carl E. Person
(15 Minutes)

United States Court of Appeals

For the Second Circuit.

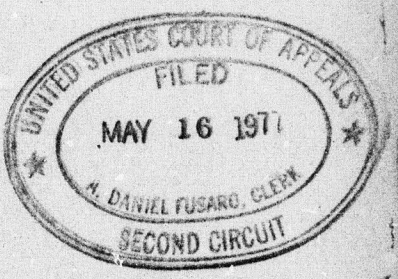
B P/S

CARL E. PERSON and CHRISTIAN THEE,
Plaintiffs-Appellants,

against

NEW YORK POST CORPORATION,
Defendant -Appellee .

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.



BRIEF OF PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARL E. PERSON and CHRISTIAN THEE,	:	77-7150
Plaintiffs-Appellants,	:	
-against-	:	
NEW YORK POST CORPORATION,	:	
Defendant-Appellee.	:	

BRIEF OF PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

This is an appeal by plaintiffs from a final judgment by Judge Edward R. Neaher of the United States District Court for the Eastern District of New York filed February 23, 1977 (A-305), dismissing

(i) under Rules 12(b)(1) (standing) and 12(b)(6) (failing to state a claim), F.R.Civ.P., plaintiffs' action for damages and injunctive relief under §§ 203, 206 and 208 of the Investment Advisers Act, 15 U.S.C. §§ 80b-3, 80b-6 and 80b-8; and

(ii) under Rule 56 (summary judgment), F.R.Civ.P., plaintiffs' action for damages and injunctive relief under §§ 1-2 of the Sherman Act, 15 U.S.C. §§ 1-2 —

based upon the refusal by defendant and other publishers of major daily newspapers in New York City to publish plaintiffs' tombstone advertisement (A-31) announcing the public offering under Regulation A

of shares in a lawsuit. Also, this is an appeal from Judge Neaher's order of February 22, 1977 (A-278) denying plaintiffs' motion for a preliminary injunction to halt further violation of the Investment Advisers Act.

Plaintiffs moved initially for a preliminary injunction under the Investment Advisers Act claim and, thereafter, in response to defendant's motion to dismiss and for summary judgment, plaintiffs cross-moved for Rule 56(f) discovery on the antitrust conspiracy issues and for a continuance of defendant's summary judgment motion, both of which motions by plaintiffs were denied by order dated February 22, 1977 (A278). Plaintiffs' motion for reargument and for leave to amend their complaint (to correct alleged pleading deficiencies) was also denied, by order dated April 7, 1977 (A320).

Judge Neaher's supporting Memorandum and Order, dated February 22, 1977 (A278) is not reported, apparently, except in the March 15, 1977 edition of BNA's "Antitrust & Trade Regulation Report", pages 2-3 of the "A" Section.

STATEMENT OF THE ISSUES

Was it error for the district court:

1. to hold that the first amendment prohibits the issuance of a preliminary or permanent injunction against a newspaper even if the newspaper is violating the Investment Advisers Act?

2. to hold that defendant's selection and publication of only those tombstone advertisements for public offerings it determined were "suitable" for its readers was not illegal investment advice under the Investment Advisers Act?

3. to hold that the plaintiffs made no showing of injury or irreparability and, under the Investment Advisers Act, had no "standing" to sue?

4. to hold that an attorney cannot conspire with his client under the Sherman Act?

5. to deny plaintiffs' cross-motion for Rule 56(f) discovery of defendant's affiants and law firm (all named in the complaint as co-conspirators) on the conspiracy issues?

6. to grant summary judgment on the Sherman Act, § 1 conspiracy claim?

7. to grant summary judgment on the Sherman Act, § 2 claim, particularly when such relief was neither noticed nor sought by defendant, and the issues were not briefed by either side?

STATEMENT OF THE CASE

The Facts

Plaintiffs as Attorneys General in Antitrust Action concerning Alleged Stolen Board Game

During September, 1975 (A14), plaintiff Thee brought an action (the "Thee Action") against game publisher Parker Brothers, Inc., its parent company General Mills, Inc. and game design firm Marvin Glass & Associates alleging that they stole Thee's idea for "Artifax", an art auction board game, and published it under

the name "Masterpiece" (A107 and A13-18). The complaint in the Thee Action alleges a conspiracy to steal game ideas and "launder" (i.e., disguise) their true origin and ownership (A14), in violation of § 1 of the Sherman Act, among other claims for relief (A16). The Thee Action is pending in the Eastern District of New York and (against the Glass firm) in the Northern District of Illinois, Eastern Division (A107).

Parker Brothers sold more than 2-1/2 million units of "Masterpiece" for an aggregate wholesale price of about $7,500,000 and paid royalties to Glass amounting to more than $420,000 (A17). Thee seeks millions of dollars in damages, trebled, and $10,000,000 in punitive damages from each of the three defendants (A17).

Plaintiff Person has been Thee's attorney of record in both parts of the Thee Action from commencement to the present (A19, A107). Parker Brothers and General Mills are represented by Davis Polk & Wardwell, a leading and well-established law firm (A20). Glass has been represented by 2 law firms, one in Chicago and another in New York (A20).

Financial Aspects to Thee Action

Person is employed as Thee's attorney on a wholly contingent-fee basis (A107, A19). To prosecute the Thee Action properly, in Person's professional opinion (A46-47), various out-of-pocket expenses must be incurred amounting to about $30,000 to $40,000 per year (A21-24). The types of expenses are

described in the Offering Circular at A21-23. Thee's net worth is less than zero and he has only several hundred dollars in gross assets, not including various working models of games and paintings by Thee which he has been unable to sell (A92).

Accordingly, the ability of Thee and Person, as private attorneys general, to properly prosecute the Thee Action is being adversely and substantially affected by Thee's financial condition (A11, ¶ 11). Plaintiffs cannot afford needed depositions, travel expenses, witness fees or xeroxing costs (A21-24).

Plaintiffs Pursue Thee Action as First Amendment Rights

Plaintiffs are pursuing the Thee Action in claimed exercise of their first amendment rights to petition the courts for a redress of their grievances and to associate with themselves and others (including persons who would be interested in purchasing shares in the Thee Action) for political purposes (A107-108, A251-254) -- to enforce the Sherman Act and Investment Advisers Act, which are enforced by the United States Justice Department on a discretionary, therefore, political basis (A198-202, A210, A51, A283).

Public Offering of Shares in the Thee Action

In order to raise the needed funds, plaintiff Thee filed with the Securities and Exchange Commission under Regulation A for a public offering of $500,000 in shares in the Thee Action (A107-108). The offering is on a straight "best-efforts" basis, so that any number of the offered shares may be sold (A7). Plaintiff Person

is the bonded Trustee of all moneys raised (A24, A27) and the investors are secured by the filing of Financing Statements under the Uniform Commercial Code (A26-27). All moneys raised are to be used by the trustee to purchase short-term United States government securities (A21, A24), and only the interest is to be used to finance the Thee Action (A21). The principal would be available at all times to redeem the outstanding shares on 7 days' notice (A24-25). Upon any settlement or judgment in the Thee Action, investors would be paid a 25% annual return, compounded annually, together with a 100% refund of the amount they invested (A25-26). If the Thee Action were lost, investors would receive a refund of their investment, subject to market fluctuations of the short-term U. S. government securities (A24-26). In other words, there is a virtual 100% safety of principal coupled with the prospects of a comparatively high return per year (25%), compounded annually. The offered securities are of highest quality (A156-157). All of the public offerings for which defendant currently publishes tombstone advertisements are far riskier and with substantially lower returns (A39-40). None of these guaranteed to the investor, with U.S. government securities, the return of his investment.

Refusals by Defendant and other Newspapers to Publish Tombstone Advertisement

On June 22, 1976 (A88), 3 days before the Regulation A offering became effective for sale (A68), plaintiffs delivered a copy of a tombstone advertisement (A-32) together with a request for insertion (A88) to defendant's newspaper, The New York Post ("Post") (A37, A88) and delivered or mailed identical requests

(A37, A109) to the other major daily newspapers in New York City: The New York Times, the Eastern Edition of The Wall Street Journal, Staten Island Advance and the New York Daily News (A109). All of these newspapers except the Daily News (A71) refused to publish the advertisement (A37). Plaintiff subsequently ran the ad in the Daily News on July 23, 1976, but with no success, as had been previously anticipated by Person because of the unsuitability of the Daily News for the purpose (A43, A109, A155, A157 and A223). None of the offered shares was sold (A155, A221).

Ira Ehrlich, Person's legal assistant (A88) delivered a copy of the tombstone advertisement (A32), offering circular in final typewritten form (A7-31) and letter from Person requesting insertion of the advertisement (A88) to Richard LeLong (A88-89), a salesman in defendant's financial advertising department (A144). LeLong told Ehrlich that the offering circular would have to be approved by the SEC (A89). Ehrlich told LeLong that Person's letter stated that the SEC had already permitted the offering to proceed (A89). Then, LeLong said he wanted to know if the circular had a provision for refund to investors if the issue was not completely sold (A89). Ehrlich pointed to a relevant provision and told LeLong to speak with Person about this (A89). Such a provision was pointed out to LeLong (A89), risk factor # 12 in the circular (A11-12). Then, LeLong told Ehrlich that in any event the offering circular would have to be examined by a committee of the Post before the tombstone advertisement could be published (A90, A144).

On June 23, 1976 LeLong advised Ehrlich by telephone that the Post was "rejecting the ad" as "not suitable" for publication (A90).

During the morning of June 25, 1976, Person spoke with Lawrence Goldreyer, defendant's Financial Advertising Director (A141) who said that defendant's Advertising Acceptability Committee refused the tombstone advertisement as "not acceptable" (A38) and that such rejection was typical of defendant's procedures (A38); and that this happened with great frequency with tombstone advertisements (A38). Person told Goldreyer that, as a matter of courtesy to the Post, Person should speak with defendant's Business Manager (A38), a Byron Greenberg (A135).

On the same day, nearing noon, Greenberg telephoned Person (A38) and said that the Advertising Acceptability Committee of defendant found the advertisement "not acceptable" (A38-39); that he supposed it was a policy not to accept offerings of "contingent interests"; that the offering circular made reference to certain risk factors important to investors; that defendant has rejected other tombstone advertisements; that defendant does this rejecting of advertising based on criteria; that there may be a number of aspects to such criteria; that defendant made a "judgment call" based on a review of Person's submitted copy, including the background on it; it was the view of the Committee; and that for specific reasons the defendant believed that the advertisement was not acceptable (A39).

Person advised Greenberg that Person was going to file a federal action (A229) against the Post on that same day, under the Investment Advisers Act of 1940 and other statutes to settle, once and for all, this tombstone refusal procedure (A51) of the major daily newspapers in New York City; and that Greenberg should tell the Committee about the forthcoming suit and see if the Committee would reconsider its decision (A39). Person heard nothing from defendant and Person filed his complaint at 4:30 P.M. on June 25th and had Greenberg served 25 minutes later (A39), pursuant to a clerk's order for personal service (record document # 2).

Defendant claims that its "Advertising Acceptability Committee" was no more than than 2 or more discussions between LeLong and Goldreyer on June 22 and 23, 1976 (A141, A145). LeLong is a salesman in the defendant's financial advertising department (A144) and Goldreyer is LeLong's superior (A145), defendant's Financial Advertising Director (A141). The editorial side of defendant's newspaper was not involved — only the commercial side.

Arthur Brody, Advertising Director of the Post (A138), claims that tombstone ads as all other ads are judged by the Post on their respective merits (A139).

The original complaint alleged a violation of (i) the Investment Advisers Act (defendant's selection of "suitable" tombstone ads to publish for its paying readers constituting illegal investment advice); (ii) §§ 1-2 of the Sherman Act; (iii)

the Securities Act of 1933; (iv) the Securities Exchange Act of 1934; and (v) § 1985 of the Civil Rights Act (A-1).

When Ehrlich arrived at the Post's premises to serve the summons and complaint, defendant's guard told Ehrlich that the Post "had no attorneys" at the Post's place of business (A225). Seven days later, on July 2, 1976 (A225), Ehrlich served the secretary to defendant's General Manager and Treasurer, Byron Greenberg with the motion papers for plaintiff Person's preliminary injunction motion. At this time, Greenberg's secretary, Ms. B. Lopez, asked Ehrlich why he did not take the papers to the Post's attorneys, Messrs. Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss") (A225). Paul, Weiss was defendant's attorneys in various unrelated matters prior to June 22, 1976 (A229, A36), most notably in the highly-publicized Pentagon Papers matter.

Post's Editorial Bias Favoring Major Corporate Advertisers and Their Published Tombstone Ads

The Post has an editorial policy slanted in favor of its major corporate advertisers (A44) and against small businesses competing with these favored companies (A45, A86). (General Mills, Inc. appears to be one of these major corporate advertisers in the Post, spending $63,300,000 each year in advertising in all media. - A45) The bias is well known to the Post's own reporters, who went out on a "byline strike" during February, 1976 because the Post's editor-in-chief and publisher killed the remaining articles in a series critical of supermarket advertisers (A44-45,

A82). Nevertheless, the Post was not reluctant to cripple competing food retailers (small business telephone order services) with stories such as "CITY ACCUSES PHONE-ORDER FOOD SERVICE OF $4M GYP" (A86, A50).

This bias in favor of major corporate advertisers and against small competing businesses is evident from the Post's own pages with respect to tombstone advertisements published by the Post. The Post gives "editorial" support (i.e., space in the form of "news" items) to major corporate offerings of securities which have tombstone ads published on the same day (A41, A43-44, A79).

Also, the Post is known to be in weakened financial condition (A87, A50-51), which is inconsistent with its refusal of plaintiffs' offered advertising in absence of anticompetitive purposes (A245). The Post purports to be offering to accept all advertising, through its published rate card and its listing in an advertising industry publication, without any stated limitation on the types of financial advertising it will publish (A41).

Post readers are unaware of the bias, particularly relating to the Post policy concerning tombstone ads (A48, A222-223) and editorial support (in the form of "news" items) for public offerings having tombstone ads running in the Post.

Defendant as Member of Trade Group Which Establishes Advertising Acceptability Standards for Major Daily Newspapers in New York City

The Post was a member of The Better Business Bureau of Metropolitan New York, Inc. (the "BBB" -A234) until December 31, 1971, according to defendant (A272). The Nabcor Action, discussed below, against the BBB and others was commenced by clients of Person in December, 1970 (A192, A229). Daniel L. Lionel, defendant's Advertising Manager (A234) until 1967 (A271) and Mortimer W. Hall, defendant's successor Advertising Manager (A234) until December 31, 1970 (A272) were directors of the BBB (A234, A271). Defendant does not state which if any of its officers or employees was a BBB director during 1971, defendant's last year of BBB membership, or during 1972-6 (A271-272).

Person testified by affidavit (A155, A234) that he is the attorney for the plaintiffs in the Nabcor Action, discussed below, and that he is waiting to go to trial with this BBB part of the Nabcor Action (A234). As an expert with 7 years of experience in investigating such matters to be tried, Person has testified by affidavit that he plans to prove (i) that the advertising managers of the major daily newspapers in New York City, including the named advertising managers of the Post, have regular communications with each other, as BBB directors, concerning the acceptability of advertising offered to the major daily newspapers by small businesses (A234); and (ii) that this communication takes place through the auspices of the BBB, functioning as a trade association

for the benefit of its big business members (A234). Defendant did not deny this joint establishment of advertising acceptability standards by the major daily newspapers in New York City; nor did defendant deny that it used any of these previously-adopted joint standards when deciding to reject the tombstone advertisement offered by plaintiffs (A271-272). Each of the other major daily newspapers has a selective tombstone publication policy (A51) according to the Senior Vice President of The Wall Street Journal who told this to Person (A51) and the Justice Department spoke with this high official about such policy but refused to take any action (A51). (Note: Line 6 of ¶ 37 on p. A51 should be corrected to read "it would not insist".)

Defendant Advised by Attorneys for General Motors in the Nabcor Action

Messrs. Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss") are the attorneys for General Motors Corporation ("GM"), GMAC, GM President Roche and GM Board Chairman Donner (the "GM Defendants") in a major antitrust action (the "Nabcor Action") by National Auto Brokers Corp. ("Nabcor") and 9 other plaintiffs alleging that the GM Defendants, BBB and other defendants conspired to prevent Nabcor and its 250 franchised automobile "brokers" from selling new cars to the public at discount prices, in violation of the Sherman Act (A166-167). Person, as the plaintiffs' attorney in the Nabcor Action, informed Paul, Weiss during September, 1975 and at various times thereafter that he was going to try to arrange for his clients to sell shares in their Nabcor Action (A158-159, A35).

The plaintiffs in the Nabcor Action were unable to prosecute the Nabcor Action properly because of their lack of funds (A193-194) and this was well known to Paul, Weiss (A158-159). Proper funding of the plaintiffs' side of the Nabcor Action would be a material adverse development to GM and, accordingly, to Paul, Weiss.

Because of (i) the statement by defendant's guard to Ehrlich that defendant had no in-house attorney; (ii) the statement by Greenberg's secretary to Ehrlich that Paul, Weiss were the Post's attorneys, before they appeared in this action; (iii) Person's threat to the Post's General Manager and Treasurer of a federal action based on an area of law (the Investment Advisers Act of 1940) too sophisticated for lay employees of the Post to handle without advice from an attorney; and (iv) Person knew that the Post was previously represented by Paul, Weiss (A97, A244-245), Person concluded, reasonably, that defendant could well be conspiring with Paul, Weiss and Person amended his original complaint against defendant by serving and filing his (1st) Amended Complaint (A94) and alleged that defendant conspired with Paul, Weiss (A98) to prevent Person and Thee from publishing tombstone advertising announcing the offering of shares in lawsuits,

> "to prevent capital from being raised by persons such as plaintiffs and Person's other clients in competition with or against the best interests of the major corporations which regularly advertise (or may advertise) in their newspapers, or the major corporations which in fact own most of the major daily newspapers in New York City." (A112)

Defendant's numerous affidavits (A123, A135, A138, A141, A144, A265 and A271) never met the critical issue raised in plaintiffs' pleadings (A110) as to what discussions, if any, defendant's employees had with Paul, Weiss concerning acceptability or not of plaintiffs' tombstone advertising prior to commencement of this action at 4:30 P.M. on June 25, 1976. Defendant's Statement under Rule 9(g) (A147-149) does not deny that defendant ever was advised by Paul, Weiss not to publish tombstone advertising for public offerings of lawsuit stocks. This failure to meet the critical issue could hardly have been an oversight by Paul, Weiss, particularly because it was named as a co-conspirator.

Paul, Weiss' Conflict of Interest with Defendant

Because of the interest of the GM Defendants in having the plaintiffs in the Nabcor Action remain without proper suit funding (A193-194), Paul, Weiss, as attorneys for the GM Defendants, had a conflict of interest with the Post during its entire representation of defendant. Because of such conflict of interest, Paul, Weiss was required under DR 5-105(A) of the Code of Professional Responsibility to decline the representation of defendant; and under DR 5-101(A) Paul, Weiss was obliged to disclose, before accepting representation of defendant, its representation of GM and GM's interest in the Post's publication of tombstone advertising for lawsuit securities offered by Person or his clients. Also, Paul, Weiss, as a prospective witness, was required in any event not to accept representation of the Post, under DR 5-101(B).

Assuming that the required disclosure to defendant was fully made by Paul, Weiss before it accepted representation in this matter, Paul, Weiss must have communicated GM's interest in the matter to defendant. If the communication did in fact occur prior to commencement of this action, defendant's actions toward plaintiffs were wholly consistent with such communicated interest of GM. Interestingly enough, at the time of any such required disclosure, Paul, Weiss was not acting as defendant's attorney in the matter and no claim could be made that Paul, Weiss and defendant could not be in conspiracy with each other (but see Judge Neaher's Memorandum and Order, at A295).

Plaintiffs moved to disqualify Paul, Weiss as attorneys for defendant (A152), but Paul, Weiss opposed the motion (A277). Ultimately, after final judgment was entered, on February 23, 1977 (A305), defendant changed attorneys (A306), presumably because of the change of defendant's ownership and control, which was highly publicized. Plaintiffs' concern is that each of the affidavits by defendant's employees was prepared by or under the supervision of Paul, Weiss, acting at the time either without disclosure of its conflict of interest, or acting in arguable continuation of the alleged conspiracy. In any event, upon defendant's filing of the 1st Amended Complaint on July 6, 1976 (A94) alleging Paul, Weiss as a co-conspirator, Paul, Weiss should have disqualified itself and turned the defense over to another law firm.

Plaintiffs' Cross-Motion for Discovery under Rule 56(f)

The following alleged co-conspirators were identified by name at ¶ 8(a)-(g) of the 2nd Amended Complaint (A110):

(a) Dorothy Schiff, Editor-in-Chief and Publisher;

(b) Byron S. Greenberg;

(c) Lawrence Goldreyer;

(d) Richard LeLong; and

(e) Paul, Weiss.

The affidavits upon which the district court granted summary judgment and dismissal included affidavits by four of the above alleged co-conspirators:

1. Byron S. Greenberg (A135 and A271);

2. Lawrence Goldreyer (A141);

3. Richard LeLong (A144); and

4. Paul, Weiss (by partner Morris B. Abram, A123 and A265).

In opposition to defendant's motion for summary judgment and to dismiss, plaintiffs cross-moved for discovery on the conspiracy issues under Rule 56(f) and a continuance of the summary judgment motion (A152-153). In his supporting affidavit, Person stated:

> "2. I am unable to present by affidavits facts essential to justify my opposition to defendant's motion for partial summary judgment on the antitrust conspiracy (§ 1, Sherman Act) claims because most of the essential facts needed by plaintiffs to prove their claims are known only to defendant, its co-conspirators and perhaps others. See my Statement under Rule 9(g) for a statement of the essential facts (based on information and belief, for the most part) which I plan to prove. It is essential that plaintiffs

obtain discovery of defendant..., the co-conspirators and any others to be able to provide the facts essential to justify plaintiffs' opposition to defendant's motion." (A154-155)

In plaintiffs' memorandum of law (A250), plaintiffs said:

"... Plaintiff needs this discovery to prove the existence of the alleged conspiracy to restrain trade, and that the Post and its attorneys and others are active members of the conspiracy. Plaintiff should be given the opportunity to obtain evidence about the alleged antitrust conspiracy from the persons who know about it — the Post and its attorneys, and others." (A250)

Under DR 7-104(A)(1) of the Code of Professional Responsibility, Person was prohibited from communicating with defendant's Greenberg, Goldreyer and LeLong concerning the subject matter of this action. Plaintiffs previously had attempted to obtain Rule 56(f) discovery in this action, but were not permitted to do so (A312).

Relevant Market re § 2 Claim

For purposes of the § 2 claim under the Sherman Act, plaintiffs defined their relevant geographic market to be "New York City" and their relevant product or service market as "major daily and Sunday newspapers having at least 50% of their circulation in New York City which are suitable for publication of tombstone advertising (based on where tombstone advertising is usually published)" (A114, A263-264). Plaintiffs alleged that 100% of this defined market was foreclosed to them through the conspiracy alleged (A109, A264).

Grant of Summary Judgment on § 2 Claims without Notice or Briefing

The district court granted summary judgment on plaintiffs' § 2 claim even though defendant had not requested summary judgment in its moving papers and even though neither side briefed the issue (A121; A124 at ¶ 4; A125 at ¶ 9; A130 at ¶ 28; A131 at ¶ 30; A132 at ¶ 35; and particularly at A133 at ¶ 38).

Motions Below

Seven days after commencement of his action against defendant, Person served moving papers on defendant for plaintiff's preliminary injunction motion (A225), to enjoin defendant from publishing any more tombstone advertisements unless it published all that were offered to it by Person, Thee and any other clients of Person (A33). Four days thereafter, on July 6, 1976, before service of any opposing papers, plaintiff served his (1st) Amended Complaint (see docket sheet entry on p. "v" for document # 5).

During a pre-trial conference before Judge Neaher on July 19 or 20, 1976, concerning plaintiffs' preliminary injunction motion, plaintiff requested permission to amend his 1st Amended Complaint to include Thee as a plaintiff (A312). By order, Person was granted permission to amend his 1st amended complaint to this limited extent (A105), and the 2nd amended complaint was served on July 21 or 22, 1976 (A106).

About one month later, on or about August 18, 1976, defendant served its motion to dismiss and for (partial) summary judgment (A121). Plaintiffs cross-moved for discovery on the

conspiracy issues and a continuation of defendant's motion under Rule 56(f) as well as for disqualification of defendant's counsel, Paul, Weiss (A152).

Determination of the District Court

On February 22, 1977, Judge Neaher decided in his Memorandum and Order (A278), as follows:

1. Denied plaintiffs' preliminary injunction motion (A282);
2. Denied plaintiffs' motion for discovery on the conspiracy issues under Rule 56(f) (A296);
3. Granted summary judgment in favor of defendant as to plaintiffs' claims under §§ 1-2 of the Sherman Act (A300, A301); and
4. Granted a dismissal under Rule 12(b)(1) ("standing") and under Rule 12(b)(6) as to plaintiffs' claims under the Investment Advisers Act (A285-286).

On February 23, 1977, Judge Neaher filed a judgment in favor of defendant dismissing all of plaintiffs' claims (A286-287).

On March 4, 1977, plaintiffs served moving papers for reargument, and for leave to amend their complaint to add allegations the district court opinion implied were missing from the complaint (A309-310). The district court denied the motion in its entirety by Memorandum Order dated April 7, 1977 (A320-321).

Whereupon, plaintiffs have taken this appeal.

ARGUMENT

1.

THE FIRST AMENDMENT DOES NOT PROHIBIT A NEWSPAPER FROM BEING ENJOINED FROM VIOLATING THE INVESTMENT ADVISERS ACT

Judge Neaher denied plaintiffs' motion for a preliminary injunction as the first of various holdings in his Memorandum and Order (A280), saying that plaintiffs' motion for a preliminary injunction "runs squarely against the wall of freedom of press", citing Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974). Clearly, the Court below erred in this sole reason for denying plaintiffs' preliminary injunction motion. In fact, the court below should never have arrived at any constitutional determination.

Plaintiff sought a preliminary injunction on the basis that defendant was violating the Investment Advisers Act of 1940 (and under the securities acts, which claims plaintiffs do not now pursue). Clearly, the courts have the power to enjoin violations of federal law, even though the violator happens to be a newspaper. See Securities and Exchange Commission v. Wall Street Transcript Corp., supra; also, Associated Press v. United States, 326 U.S. 1, 20 (1945) to the effect that the press is not immune from antitrust laws; also, see Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 391 (1973) relating to publication of employment advertising specifying "male" or "female" preference.

Assuming that the activities of defendant are a violation of the 1940 Act, discussed as the next point, plaintiffs were entitled to a preliminary injunction, under the test of Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2nd Cir. 1973), which stated:

> "... The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury; or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." 483 F.2d 250.

In Triebwasser & Katz v. American Telephone & Telegraph Co., 535 F.2d 1356, 1359 (2nd Cir. 1976), the Second Circuit stated:

> "The opinion of the District Court granting the relief requested was based on the familiar test of this circuit that a preliminary injunction will 'issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.' Sonesta .... (emphasis in original). It is equally familiar law that the granting of preliminary injunctive relief lies within the sound discretion of the District Court and will not be disturbed unless there is an abuse of that discretion, Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975), or unless there is a clear mistake of law, 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1159 (2d Cir. 1974); Exxon Corp. v. City of New York, 480 F.2d 460, 464 (2d Cir. 1973)."

First Test

Plaintiffs have made a clear showing of probable success on the merits (see Point 2 below), and the actuality of irreparable

injury (see Point 3 below). By not permitting plaintiffs to run their tombstone advertising in defendant's newspaper and the other suitable major daily newspapers in New York City, plaintiffs are not be able to obtain the funding needed to properly finance the Thee Action. Thee has no funds with which to prosecute the action properly, and his only available means of financing is through his present public offering of interests in his action. Any delay in obtaining the funding prevent him from obtaining total justice in his case. Passage of time in a lawsuit limits the party and his attorney from taking certain steps (such as discovery procedures) which may be needed, but because of Thee's financial inability cannot now be done. Also, by not being allowed to advertise in defendant's newspaper and all other suitable major daily newspapers in New York City, Thee is left with impractical and unworkable alternatives (such as door-to-door peddling of securities) to the offering method contemplated by federal statute.

Second Test

Alternatively, under the Sonesta rule, there are (at least) serious questions going to the merits to make them fair ground for litigation, and the balance of hardships does tip decidedly in favor of plaintiff. Defendant would not be injured if it were required (under penalty of refusing all tombstone advertising) to publish the offered tombstone advertising (and others offered by plaintiff Person and any of his clients). Defendant can make no

showing of any legitimate interests which would be injured (other than defendant's de facto investment advisory service to its readers), and defendant could still, in exercise of its right to freedom of the press, be free to comment upon public offerings which it deemed suitable or unsuitable (without giving advice), rather than using the sale of commercial tombstone advertising as defendant's purported exercise of claimed first amendment freedom in this highly-regulated investment advisory area. Defendant clearly has no editorial interest in this area, and is using commercial tombstone advertising (or the prohibition thereof) solely for the profit of defendant and its major corporate advertisers; [illegible]dant's legitimate interests would not be injured if defendant were enjoined from continuing its illegal investment advisory activities and continued fraud and deception of the Post's readers. Public policy should put competition for capital and plaintiffs' exercise of their first amendment rights far above any claimed right by defendant to violate the Investment Advisors Act under a claimed first amendment exemption.

2.

DEFENDANT'S SELECTION AND PUBLICATION OF ONLY THOSE TOMBSTONE ADS FOR PUBLIC OFFERINGS IT DEEMED "SUITABLE" FOR ITS READERS WAS ILLEGAL INVESTMENT ADVICE UNDER THE INVESTMENT ADVISERS ACT OF 1940

Judge Neaher held that

> "The plain truth is that newspapers of general circulation like the Post are not meant to be subject to the Investment Advisers Act and no amount of casuistic ratiocination can make it otherwise." (A285)

The Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 — 80b-21 was enacted based upon the following findings of fact by Congress:

"Sec. 201. ... investment advisers are of national concern, in that, among other things —

"(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements and other arrangements with their clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;

"(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and

"(3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy."

The definition of an "investment adviser" is set forth in § 202(a)(11), as follows:

"Sec. 202. (a) When used in this title, unless the context otherwise requires — * * *

"(11) 'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include ... (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; ...."

Nowhere in any of its newspapers does defendant advise its readership of the manner in which defendant selects tombstone advertisements to publish, or which to reject, nor does defendant even advise its readership that it is engaged in any selection process.

Section 206 of the Investment Advisers Act provides:

"It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly --

"(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

"(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

* * *

"(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive or manipulative."

The SEC adopted the following regulations:

"Reg. § 275.206(4)-1. (a) It shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 206(4) of the Act, for any investment adviser, directly or indirectly, to publish, circulate or distribute any advertisement:

* * *

"(5) which contains any untrue statement of a material fact, or which is otherwise false or misleading.

"(b) For the purposes of this rule the term 'advertisement' shall include any notice, circular, letter or other written communication addressed to more

than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities."

Defendant's undisclosed activities in publishing some but not all tombstone advertisements clearly is a practice falling within various of the foregoing provisions prohibiting fraud, deception and manipulation.

Section 208 provides general prohibitions as follows:

* * *

"(d) It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this title or any rule or regulation thereunder."

The Investment Advisers Act prohibits an unregistered investment adviser from compiling a list of recommended or approved tombstone advertisements of public offerings and selling this list to the public (a clear-cut violation of the Act) and, therefore, under § 208 above, defendant is prohibited from doing the same thing indirectly, by its selection of which tombstone advertisements to publish, for compensation (from the knowing advertiser and unwitting reader).

By its selection of tombstone advertisements to publish, and which to reject, defendant is performing the function of an

investment adviser, and doing this for compensation. Defendant's compensation is derived from the purchasers of the newspapers (many prospective investors in the Thee public offering of lawsuit securities) and from Issuers who have been selected by defendant to have their respective tombstone advertisements published by defendant, for compensation.

Defendant's newspaper, through its selection of tombstone advertising, is practicing a fraudulent, deceptive and manipulative course of business conduct on its readership. Readers are unaware that other types of public offerings are being made, other than the ones permitted to be advertised in defendant's newspapers. The selective publication of tombstone advertisements is an implied (but false) representation to the public that the newspaper accepts all offered ads, unless the newspaper states to its public that it is selecting only some of the offered advertisements and advises the public the basis on which defendant makes the selection. Of course, if defendant did this, defendant would be required to register as an investment adviser. Nowhere in defendant's rate card is there any description of the discriminatory procedure for acceptance and publication of some but not all offered tombstone advertisements. Defendant's screening of plaintiffs' offering circular to determine suitability for its readership are the activities of an investment adviser, not a bona fide newspaper. Also, defendant's claim that it was screening for suitability of its readers is difficult to accept because of the varied needs and interests of the readership of any newspaper. The Post unilaterally is attempting to reverse federal policy of full disclosure, through

its "Advertising Acceptability Committee" consisting of a low-level financial advertising salesman and his immediate superior, neither one of which has any demonstrated ability to select securities for the Post's readership.

Also, defendant clearly is refusing to publish plaintiffs' tombstone advertisement because the advertisement would be detrimental to the interests of major corporate advertisers in defendant's newspaper, upon whom defendant depends for most of its advertising revenues. By publishing only some of the offered advertisements (the ones apparently not detrimental to the major corporate advertisers) defendant newspaper is practicing another deceptive and manipulative practice on its readership, involving the non-disclosure of a major conflict of interest. The defendant owes its readership a statement of the basis on which defendant publishes the tombstone advertisements which meet with defendant's approval, particularly to eliminate defendant's involvement in a scheme for the unfair allocation of capital and destruction of competition, in which defendant is heavily involved, and maximizing of defendant's profits in connection with its conflict of interest with its readers, without any opportunity for its readers to fend for themselves.

The offering of plaintiff Thee is safer than virtually all investment opportunities offered by "suitable" tombstone advertising through defendant's newspaper, but the public is not alerted to the fact that defendant screens out offerings which are near riskless (as to the principal amount involved -- of the

Thee type, for example) or offerings where the rate of interest (although contingent) on the securities is perhaps higher than anything ever offered in defendant's newspaper, by its unwritten policy of accepting some and rejecting other tombstone advertisements. Defendant does not advise its readers about this type of adverse selection; nor does defendant advise its readers that defendant only publishes tombstone advertisements which its major corporate advertisers would not find offensive, in defendant's opinion.

Defendant is not a "bona fide newspaper" under § 202(a)(11)(D) of the Investment Advisers Act. The Act contemplates that newspapers are exempt from the Act unless they perform investment advisory activities otherwise regulated by the Act (i.e., activities which non-newspapers would be prohibited from conducting, in absence of registration). Upon such involvement in investment advisory activities by a newspaper, the Act contemplates that the newspaper is not a "bona fide newspaper", and that it is subject to the registration and other requirements of the Act. Also, the exemption for a "bona fide newspaper" is to be disregarded, if necessary by context, to include newspapers as investment advisers in the present situation (although plaintiff claims that the "bona fide newspaper" exemption is not available to defendant under the facts of the case) by the first part of § 202(a), which states:

> "When used in this title, unless the context otherwise requires...."

There is no federal policy to permit defendant newspaper to upset the full disclosure requirements of the Investment Advisers Act, the Securities Act of 1933, and the Securities Exchange Act of 1934. The fact that the SEC has reviewed Mr. Thee's offering circular should mean that the tombstone advertisement for Thee's offering should have its chance to be obtained and read by prospective investors in competition with the offering material for those Issuers who are permitted by defendant to publish tombstone advertising in defendant's newspaper. The policy of full disclosure is the essence of competition, to require that competing offerings be brought to the attention of prospective investors through full disclosure, not by suppression of some and backing of others by defendant newspaper, for the advantages sought and gained by it and its major corporate advertisers.

Freedom of the press is clearly not an issue, as to the investment advisory activities of defendant (see Wall Street Transcript, cited below). If defendant wants to get out of the illegal investment advisory business, it merely has to stop publishing tombstone advertisements for any public offerings. Otherwise, defendant is bound under the 1940 Act to comply with he registration and other requirements, and publish all tombstone advertisements offered to it (subject, of course, to satisfactory payment arrangements). If defendant wants to editorialize on any public offerings, it is free to do so without using the manipulation of commercial tombstone advertising to make its editorial point. Defendant's only possible "justification" to avoid illegal conduct under the Sherman Act seems

to be the alleged editorial policy of defendant to select tombstone advertising for public offerings suitable, in defendant's lay opinion, for some (or all?) of its readers, but this alleged justification admits the very violation alleged by plaintiffs, that defendant is rendering investment advisory services to its readers, for compensation, in violation of the 1940 Act. Defendant might, with less force, argue that it is trying to protect its major corporate advertisers from competition, to prevent loss of advertising revenues; but this argument admits that defendant is involved in a scheme to defraud its readers, by giving investment advice without disclosing the conflict of interest to its readers.

Securities and Exchange Commission v. Wall Street Transcript Corp., 422 F.2d 1371 (2nd Cir. 1970); rev'g and remanding 294 F.Supp. 298 (S.D.N.Y. Nov. 26, 1968); cert. den. 398 U.S. 958 (1970), is the leading instance in which a newspaper was held not to be "bona fide" under the 1940 Act, because of its rendering of investment advice to its readers. The Second Circuit opinion, which is clearly controlling, states in relevant part:

> "... The case has been presented as if the sole determinative issue were the number of 'the usual indicia of a newspaper' the Transcript possesses, and the district court based its holding largely upon the size of the bundle of such characteristics.... 422 F.2d 1377
>
> "We do not think, however, that this is what Congress had in mind when it placed 'bona fide' newspapers among the exclusions from the statute's coverage. Section 202(a)(11) of the Act lists a number of examples of persons or entities whose activities might fall within the broad definition of 'investment adviser' but whose customary practices would not place them in the special,

otherwise unregulated, fiduciary role for which the law established standards. ... The phrase 'bona fide' newspapers, in the context of this list, means those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred.[9]

. . . . . .

Note 9. "It nowhere appears that the exclusion in question was made part of the Act because Congress thought it necessary to exempt all 'usual' newspapers in order to comply with the First Amendment. It appears rather that those newspapers referred to as 'bona fide' were considered to be those outside the regulatory intent of the Act. For example, the 'bona fide newspaper' exclusion is part of a list which concludes with 'such other persons not within the intent of this paragraph, as the Commission may designate * * *'"

. . . . . .

The determination of whether or not a given publication fits within this exclusion must depend upon the nature of its practices rather than upon the purely formal 'indicia of a newspaper' which it exhibits on its face and in the size and nature of its subscription list.[10]

. . . . . .

Note 10. "The appellee, assuming that the Act is not applicable to a newspaper which offers advice about specific investment opportunities in a regular feature, such as an individual column on a financial page, suggests that its own activities are no more than the same practice on a larger scale. While we express no opinion concerning the practices of other publications, differences in the manner or extent to which a publication offers investment information may very well be relevant to the Act's regulatory purpose. Cf. In re Darvas, ..."

. . . . . .

"It seems to us that the Transcript does not necessarily fit within this exclusion. ... This characteristic emphasis on particular issues and companies at the very least raises doubt about whether the Transcript is outside the exclusion - a suspicion which we believe that the S.E.C. should be allowed to investigate.

"* * * It is immaterial to the principal issue in this case whether or not the 'usual newspaper' is paid

for using the news items which it publishes if they are not offered as investment advice. What matters is whether or not a specific publication is engaged in practices which the Act was intended to regulate, such as the offering of professional investment advice without revealing the possibility of personal gain the the publisher from what he reports or how he presents it. See SEC v. Capital Gains Research Bureau, Inc. ....

"Nor can it be determined from its face that the Transcript is a 'bona fide newspaper' within the meaning of this Act simply because, as the appellee suggests, it publishes financial 'information.' Any investment adviser, including one engaged in the most nefarious of practices, offers 'information' to his clients; and any such adviser might choose to present it in the guise of traditional newspaper format. The type of printing and paper used, the employment of a certain number of reporters, the hiring of wire services, and the fact that 'information' is offered and circulated generally would not necessarily reveal anything about the commercial practices involved or the financial interests served in its publication. It would be totally inconsistent with the purposes of the Act to hold that the exclusion would permit an unscrupulous operator to forestall investigation by arguing at a subpoena enforcement proceeding that his publication had enough of the trappings of a newspaper to prevent any inquiry into the practices involved in its publication and sale to investors. The Act's exclusion of a 'bona fide newspaper' does not require a definitive description of a 'typical newspaper.' ....

"Moreover, it is not necessary to enlarge the category of 'bona fide' newspapers into an exclusion for all publications which could conceivably be brought within the term 'typical newspaper' in order to avoid the 'seeds of a constitutional controversy' which the appellee argues would result from an attempt to regulate the conduct of any newspaper publisher. As Justice Harlan pointed out in Curtis Publishing Co. v. Butts, 388 U.S. 130, 150, 87 S. Ct. 1975, 1989, 18 L.Ed.2d 1094 (1967):

> "'A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws * * *" Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only examples of our understanding that the right to communicate information of public interest is not "unconditional."' * * * (Emphasis supplied.)

"The Investment Advisers Act does not on its face abridge freedom of the press simply because it may be applied to publications which are classified formally as part of the 'press' for some purposes but are not 'bona fide newspapers' excluded under the Act. It is not necessary to base a construction of the Act on the assumption that the activities involved in giving commercial investment advice are entitled to the identical constitutional protection provided for certain forms of social, political or religious expression.

* * *

"Determining whether a specific newspaper is 'bona fide' for the purposes of the Act requires the delineation of a boundary between the special type of 'merchandising' activities which must lead to registration and the publication of expression which lies beyond the Act's regulatory purposes. Since the Transcript's practices have not yet been explored, neither this court nor the district court is presently in an appropriate position to attempt to draw such a line. But the distinction required by the words 'bona fide' in the Act, when made, will be based on a study of the context in which the activity or expression in question occurs. The process by which a proper categorization is reached will therefore parallel the investigation appropriate to a determination of whether a particular activity is a restricted practice or a form of expression protected by the First Amendment. See, e.g., United States v. O'Brien, ...; Tire, Inc. v. Hill, ...; Mills v. Alabama, ...; New York Times Co. v. Sullivan, ...; Valentine v. Chrestensen, ...; see generally Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877 (1963) .... Thus no constitutional conflict is inherent in the fact that an investment advisory 'newspaper' which is not 'bona fide' might be required to register.[13]

. . . . . .

Note 13. "A conflict is not introduced simply by designating the Act a form of 'licensing statute,' without regard to the nature of the activities or expression involved, as the appellee argues. If a publication is 'bona fide' under the Act and within the First Amendment's protection of expression, it will not be subject to regulation or 'licensing.' And even if a newspaper is engaging in commercial practices which may be regulated, the Act grants no authority for review or censorship by the Commission of investment advisory material prior to its publication. ...." 422 F.2d 1380

. . . . . .

There appear to be no other cases as relevant as the Wall Street Transcript case.

Plaintiffs have alleged various practices of defendant which require application of the Act: a selective tombstone publication policy; editorial support for tombstones of major corporations; editorial support for these same corporations in other areas; refusal to print information adverse to the major corporations; alleged conspiracy with attorneys for a major advertiser (GM) to reject plaintiffs' tombstone advertising; lack of any demonstrated legitimate business purpose in rejecting plaintiffs' tombstone; misleading of the public by failing to disclose either the basis for selection of the tombstone advertisements published by defendant or the conflict of interest which defendant has with its readership relating to publication of tombstone advertisements. These factors and more which could be developed during discovery should lead to the inevitable conclusion that defendant is not exercising editorial judgment, but is engaged in a deceptive money-making practice which the Act was designed to prevent. Clearly, plaintiffs have stated a cause of action under the Investment Advisers Act.

Defendant may not operate as a guise for giving disinterested investment advice inasmuch as its real function is to serve the interests of defendant (and its major advertisers) in its capacity as a newspaper. See Ernest Hack, '71-'72 CCH Dec. ¶ 78,426 (S.E.C. 1971), in which a similar holding was made as to a registered representative who proposed a market letter which would serve his interests as a registered representative

in conflict with the interests of his intended readers. The SEC said, in part:

> "... An investment adviser is a fiduciary who is prohibited from engaging in any activity in conflict with the interests of his clients. Consequently, the investment advisory activity may not be utilized in suchs a way as to operate as a guise for giving disinterested advice, if, in fact, its real function would be to serve the interests of the adviser in his capacity as a registered representative."

To the extent defendant intends to provide assistance to its readers in forming their investment decisions, defendant is required to register as an investment adviser. The Media General Financial Daily, '72-'73 CCH Dec. ¶ 78,961 (S.E.C. 1971), an SEC decision, held:

> "A person claiming exemption from the registration requirements of the Act has the burden of establishing the availability of that exemption. In our view it is plain from what you have presented that your client's service is neither of general nor regular circulation nor is it the kind of bona fide newspaper or financial publication envisioned by clause (D) of Section 202(a)(11) of the Act. Manifestly, the service contemplated by your client has the objectives of assisting subscribers in forming investment judgments and decisions. Your reference to the 'format' of the publication does not in our opinion serve to produce a different result." p. 82,068.

It should be noted that defendant has an editorial policy favoring its major corporate advertisers, which policy further assists investors in forming their investment decisions when they read the tombstone advertisements (and offered prospectuses and offering circulars) which defendant permits to be published in the New York Post.

Also, the author of a book is required to register as an investment adviser if the book is to be used by investors in making

purchasing decisions. Loran K. Lantz, '72-'73 CCH Dec. ¶ 78,912 (S.E.C. 1972).

Defendant's activities are not the mere reporting of facts and figures reflecting past events, which would be exempt under Foundation Services, Inc., '72-'73 CCH Dec. ¶ 79,294 (S.E.C. 1972), if properly footnoted with a warning not to rely. Instead, defendant is making a decision based on the contents of the offering circular as well as how the business of the offeror would affect defendant's major advertisers, none of which information is disclosed to defendant's readership. Various other cases are described in CCH ¶ 56,157, under § 202(a)(11) of the 1940 Act.

3.

PLAINTIFFS MADE A SHOWING OF INJURY AND IRREPARABILITY AND, UNDER THE INVESTMENT ADVISERS ACT, PLAINTIFFS HAD "STANDING" -- WITHIN ZONE OF PROTECTED INTERESTS AND/OR AS PRIVATE ATTORNEYS GENERAL IN THEE ACTION

Plaintiffs have shown that they have need in the Thee Action for substantial funding, without which their ability to purse the Thee Action is being materially impaired. The prospects of being able to enforce their rights fully is reduced substantially by their lack of adequate funding. Upon termination of the Thee Action, plaintiffs will have no further recourse against the defendants in the Thee Action, which makes their injury irreparable as to the present action against the Post. An extended discussion of the various types of injuries being suffered by each of the two plaintiffs herein is set forth in the appendix at A255-262.

The Investment Advisers Act was enacted in part to prevent abuses in the capital markets. Congress found that

> "... investment advisers are of national concern, in that, among other things ... their advice, counsel, publications, writings, analyses and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets ... and ... the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy" 15 U.S.C. §§ 80b-1.

Congress was clearly aware of the implications for the whole economy and the various capital markets, and did not limit its concern to the persons who immediately relied on illegal investment advice. Congressional intent was to prohibit the outlawed practices, and intended that any persons showing injury be able to go into court to obtain an injunction against prohibited practices.

Defendant's activities have interfered with the capital markets, and have injured plaintiffs irreparably. Accordingly, plaintiffs have standing to sue. In Nader v. Air Transport Association of America, Tr. Reg. Rep. ¶ 61,280 (D. D.C., decided February 9, 1977), the Court held that a consumer had standing to sue an airlines to enjoin an alleged conspiracy not to compete with respect to the problem of overbooking, inasmuch as the consumer alleged he suffered particularized injury. Plaintiffs are in an identical position -- they have suffered and are continuing to suffer particularized injury, by defendant's exclusion of them from the capital markets.

Assuming arguendo that plaintiffs' injuries described and referred to above are insufficient to give them "standing" to sue under the Investment Advisers Act, plaintiffs nevertheless have the additional "standing" of being private attorneys general attempting to enforce the federal antitrust laws in the Thee Action, and defendant is wilfuly obstructing these activities in violation of the Investment Advisers Act of 1940, which gives plaintiffs the requisite interest (or "standing") to sue, to protect their first amendment activities. Not only are plaintiffs' activities protected by the first amendment (from illegal state action or arguably discretionary inaction) but legislative policy has made plaintiffs private attorneys general in connection with their attempts to enforce the federal antitrust laws in the Thee Action.

The concept of the "private attorney general" is "to encourage important policy enforcement". Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974). This is so particularly in the antitrust area, where the award of treble damages to winners is mandatory. Alyeska Pipeline Service Company v. Wilderness Society, 95 S.Ct. 1612 (1975). Although the cases do not discuss the private attorney general other than in reference to fees, the private attorney general concept, where applicable, such as in the Thee Action, should give the plaintiffs therein the opportunity of pursuing their activities without interference from defendant in wilful violation of the federal Investment Advisers Act. There would appear to be no logic in permitting continued violation

of this Act when such violations are interfering with more important federal policy, i.e., enforcement of the Sherman Act.

Also, because of the Justice Department's failure to enforce the Investment Advisers Act, plaintiffs meet an even higher standard of public policy and standing.

Accordingly, plaintiffs have "standing" to sue under the Investment Advisers Act.

4.

UNDER THE SHERMAN ACT AN ATTORNEY MAY BE A CO-CONSPIRATOR WITH HIS CLIENT

Judge Neaher clearly erred when he decided:

> "To the extent that plaintiffs' theory of concerted activity is that the Post conspired with its own ... attorneys, their § 1 claim may not be maintained, for, as a matter of law, the Post would then be conspiring with itself to perform a single, unilateral act." (A-295)

First, it is not clear that Paul, Weiss was acting as attorneys for the Post at the time any communication about plaintiffs occurred. Paul, Weiss could have made such communication, if it occurred at all, as part of the law firm's responsibility to inform a prospective client about any conflicts of interest.

But assuming that Paul, Weiss was the attorney for defendant when any such communication occurred, such communication is not necessarily within the law. The law is clear that an attorney may conspire with his client.

In Tillamook Cheese & Dairy Association v. Tillamook County Creamery Association, 358 F.2d 115 (9th Cir. 1966), the court held that although counsel of a corporation would not be liable on an attempted monopolization charge if his role was only that of a legal adviser and even if he had mistakenly advised corporate officers that a particular course of conduct would not violate § 2 of the Sherman Act, he would subject himself to liability, as in the case of any executive officer of a company, if he went beyond that role and, acting by himself or jointly with others, made policy decisions for the corporation."

In United States v. Buzzard, decided August 23, 1975, CCH Tr. Reg. Rep. ¶ 61,034 (10th Cir.), the court upheld the conviction of an attorney for a trade association of liquor retailers for violation of § 1 of the Sherman Act. Buzzard, according to a tape recording, said to a price-cutting dealer:

> "Buzzard speaking: I'd like to be able to say, well, uh, I'd like for you to say let's figure on it. Let me talk to Crawford and, uh, even Johnnie Mack and see if I could get a consensus with these gentlemen. That's all I want.
>
> * * *
>
> "Buzzard speaking: I'm just going to visit with you, perhaps, well, here's the deal. I told them not to be popping off about, uh, business, because I figured it would violate the anti-trust laws, but if anybody was going to do the popping off, I would.
>
> "Messer speaking: Uh, huh.
>
> "Buzzard speaking: And my problem, but I don't want my clients, so that's probably why I'm doing the talking." p. 69,608.

In Economy Carpets Manufacturers and Distributors, Inc. v. Better Business Bureau of Baton Rouge, Inc., CCH Tr. Reg. Rep. ¶ 61,182 (Louisiana Court of Appeal, 1st Cir., decided April 12, 1976), the court held that under the Louisiana antitrust law an attorney could conspire with his client, saying:

> "Defendant argues that Mr. Breazeale was acting in his capacity as attorney for the Better Business Bureau; that the substance of his conversation with the president of the Bureau was privileged, and could never be divulged; and that the allegations as to what occurred therein could never be proven.
>
> "This argument is without merit. We are not concerned with whether the plaintiff can prove the allegations of his petition, or whether he can win his case. We need only determine whether, if as alleged, Mr. Breazeale assisted and advised in the publication of libelous or defamatory material, defendants would be liable for any damages suffered by plaintiff as a result.
>
> "We think it clear that liability would arise under the above circumstances, under the provisions of Article 2324, supra, and find that plaintiff has alleged a cause of action." p. 70,370

Accordingly, Judge Neaher should have allowed plaintiffs to obtain discovery concerning the extent to which defendant's lawyers advised them not to run plaintiffs' tombstone advertisement, and the extent to which Paul, Weiss advised the defendant of the interest of the GM Defendants in preventing Person from obtaining litigation financing and the conflict of interest between Paul, Weiss and defendant.

THE COURT BELOW ERRED IN DENYING PLAINTIFFS' CROSS-MOTION FOR RULE 56(f) DISCOVERY OF DEFENDANT'S AFFIANTS AND LAW FIRM (ALL NAMED IN THE COMPLAINT AS CO-CONSPIRATORS) ON THE CONSPIRACY ISSUES

In response to defendant's motion for summary judgment, plaintiffs cross-moved for discovery relating to the conspiracy issues. The facts relating to plaintiffs' discovery request are set forth at pp. 17-18 above. Plaintiffs named (by reference to the complaint) four persons they wished to obtain Rule 56(f) discovery of who had submitted affidavits in support of defendant's summary judgment motion. The affidavits claimed that the refusal was unilateral, but the affiants did not state that no advice was ever given to any of them on the matter by Paul, Weiss, defendant's law firm with a conflict of interest in the matter.

In his Memorandum and Order deciding plaintiffs' cross-motion for discovery (A296), Judge Neaher said that, in order to invoke rule 56(f):

> "the opposing party should present his affidavit showing that the knowledge or control of the facts is exclusively or largely with the moving party and describe his attempts to obtain those facts."

Plaintiffs did describe their attempts - they made a motion for discovery under Rule 56(f). Previously, the Court had denied plaintiffs' request to obtain discovery in advance of the summary judgment motion which defendant planned to make. Inasmuch as there was no time to obtain discovery, there was no attempt to describe other than the concurrent efforts. The issue was whether defendant's employees communicated with Paul, Weiss about plaintiffs'

offering of lawsuit shares. Before plaintiffs moved for discovery under Rule 56(f), defendant's affiants testified they did not have various communications with third persons, but their affidavits left open the issue of whether they obtained advice from Paul, Weiss at any time prior to commencement of this action, concerning the acceptability of tombstone advertising for offerings of lawsuit securities. This issue was known to the court below and was fairly stated in plaintiffs' papers. The court below dealt with such issue by saying that an attorney cannot conspire with his client, which ruling of law is clearly erroneous. That the knowledge or control of the facts were exclusively with defendant's employees and defendant's law firm was clear from defendant's prior affidavits. Also, defendant's activities in utilizing mutually-agreed upon advertising acceptability standards when deciding to reject the offered tombstone advertising was also obviously known only to defendant's affiants and defendant's attorneys.

Judge Neaher went on to quote:

> "The mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control;" A296

Plaintiffs have complied with this for the reasons stated immediately above. Affiants for defendant proved that only defendant's affiants had knowledge of any conspiracy as alleged. Plaintiffs stated what facts appear to be within the defendant's exclusive knowledge or control.

Judge Neaher continued with his quotation:

> "(the opposing party must show) what steps have been taken to obtain the desired information pursuant to the discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures." (A296)

Plaintiffs showed their desire to take advantage of Rule 56(f) by making their motion under Rule 56(f) and also, previously, by making an oral application for such discovery during a pre-trial conference preceding defendant's motion for summary judgment. The information sought from defendant's officials and defendant's attorneys could be obtained in no other way, ethically, except through the discovery sought. Incidentally, plaintiffs cross-moved at the same time for Rule 26 (general) discovery, which was denied.

Defendant's response concerning its involvement in joint establishment of advertising acceptability standards through the Post's directorships on the Better Business Bureau did not meet the issues raised by plaintiffs. Defendant did not deny the existence of such standards nor defendant's participation in their establishment with the other major daily newspapers in New York City. Defendant merely stated that the Post advertising managers plaintiffs said were BBB directors were no longer employed by the Post. The defendant affidavits did not deny that such persons were BBB directors or that they participated with the advertising managers of the other daily newspapers in establishing advertising acceptability standards (also known as a group boycott). Also, the court below denied plaintiffs' request to amend their complaint.

The Court below cited United States v. Donlon, 355 F.Supp. 220, 225 (D. Del.); aff'd, 487 F.2d 1395 (3rd Cir. 1973) in support of its decision that plaintiffs were not entitled to limited discovery under Rule 56(f) in spite of their request for discovery. The Donlon case denied such discovery because

> "Donlon has totally failed to utilize his rights of discovery to contradict the facts asserted in DeWitt's affidavit and repeated by the documents produced. Suspicion alone without discovery is not enough." p. 225.

As said previously, plaintiffs have diligently sought discovery, but have been prevented by the court below from obtaining discovery. Thus, Donlon is not relevant.

Hummel v. Riordon, 56 F.Supp. 983, 987 (D. N.D. Ill., E.D. 1944) held in part:

> "In cases where the information with reference to a claimed fraudulent transaction rests exclusively within the knowledge of the participants, ... and in ... similar cases-- it is apparent that it would be inequitable and unjust for the court to grant a motion for summary judgment upon the affidavit of the defendant where the opposing party has no means to successfully meet the facts alleged in the affidavit. To hold so would be a denial of justice to a party who has presently not available the information with reference to the claimed fraud of the defendant."

In Ward v. United States, 471 F.2d 667, 670 (3rd Cir. 1973), the court held that when the facts are solely in the possession of the defendant, a continuance should be granted as a matter of course. It is obvious in a conspiracy case that the facts are known only to defendant and the alleged co-conspirators (including defendant's

former attorneys), and that plaintiffs have not been able to depose them because of Judge Neaher's order in chambers and his Memorandum and Order deciding the various motions.

In Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973); cert. den. 414 U.S. 1116, the court (in banc) vacated a summary judgment for the defendant when the district court failed to consider plaintiff's Rule 56(f) request which did not satisfy the form requirements of Rule 56(e).

Literal adherence to Rule 56(f) and 56(e) (assuming such has been the case, which plaintiffs vigorously deny) is not required and in any event the court below should have followed Shultz v. Manufacturers & Traders Trust Co., 30 F.Supp. 443 (W.D.N.Y. 1939), in which the court denied the Rule 56(f) motion but with leave to renew the motion within 10 days upon a showing required by Rule 56(f). Under the circumstances of the plaintiffs' case against the Post, it was an abuse of discretion for the court below to have failed to give plaintiffs an opportunity to correct any technical deficiencies which the court believes it has found. Plaintiffs made at least a substantial showing of why they did not have the facts, and it is well known that summary judgments should not be granted readily in conspiracy cases because of the difficulties in obtaining evidence, which is known only to the co-conspirators, for the most part. See Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962), which said in part:

> "It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.' Certainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, and proof is largely in the hands of the alleged cospirators, and hostile witnesses thicken the polt. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" 368 U.S. 473.

The District Court's reliance on First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) was inappropriate. Cities Service was only a "tangential defendant" and as such had no parallel interests with the other (full) members of the alleged conspiracy; it was more plausible to believe that the interests of Cities Service coincided rather than conflicted with plaintiff Waldron's interests; plaintiff Waldron did not request any other discovery when he should have done so; Cities Service entered the picture through its actions subsequent to start of the alleged conspiracy; Cities Service was a 5-3 decision, with a vigorous dissenting opinion claiming that Poller was not being followed by the majority, and that plaintiff was wrongfully being deprived of his right to a trial; plaintiff Waldron switched his factual basis belatedly, 7 years after filing of his complaint; and Cities Service was joined on mere suspicion.

Poller's rationale should be applied to motions under Rule 56(f), so that requests for discovery in conspiracy actions be granted pursuant to judicial notice that plaintiff needs the discovery in such cases, rather than make the plaintiffs make detailed showings of what is obvious to all persons concerned, if a plaintiff fails to meet some debatable technical requirement.

6.

THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT ON THE SHERMAN ACT, § 1 CONSPIRACY CLAIM.....

Erroneous denial of plaintiffs' motion for Rule 56(f) discovery, as discussed above, makes the grant of the summary judgment motion improper as to plaintiffs' claims under § 1 of the Sherman Act. This applies to plaintiffs' § 2 claims relating to an alleged conspiracy to monopolize.

In any event, plaintiffs had sufficient evidence (as detailed in plaintiffs' above statement of facts, pp. 3-19) to require a denial of defendant's summary judgment motion on the antitrust claims, §§ 1-2, and to permit plaintiffs to proceed with full discovery under the Federal Rules of Civil Procedure.

Under the Second Circuit's test in Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2nd Cir. 1975), defendant's summary judgment motion should have been denied. The Court said in part:

> "... the 'fundamental maxim' remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried." 1319-1320.

Plaintiffs have raised issues which need to be tried (see plaintiffs' Statement under Rule 9-g), including:

1. defendant's communications with Paul, Weiss concerning plaintiffs' tombstone advertising;
2. Paul, Weiss' conflict of interest with defendant concerning the same matter;
3. Paul, Weiss' duty to advise defendant concerning this conflict;
4. What disclosure was made, and when;
5. Defendant's participation with other major daily newspapers in New York City concerning establishment of joint advertising acceptability standards;
6. Use of such jointly adopted standards when rejecting plaintiffs' tombstone ad;
7. Joint policy of all major daily newspapers to reject certain types of offered tombstone advertising;
8. Knowledge of each newspaper that other newspapers are following same or similar standards;
9. What constitutes the relevant market (geographical and product-service);
10. Whether market domination or merely an appreciable portion of the market is needed, and if the former, whether the Daily News is part of such market.

7.

THE COURT BELOW IMPROPERLY GRANTED SUMMARY JUDGMENT ON THE SHERMAN ACT, § 2 CLAIMS - SUCH RELIEF WAS NEITHER NOTICED NOR SOUGHT BY DEFENDANT, AND THE ISSUES WERE NOT BRIEFED BY EITHER SIDE

Even though defendant did not request a summary judgment as to plaintiffs' § 2 claims under the Sherman Act (see p. 19 above), and did not brief the issue, the court below granted summary judgment as to the § 2 claims. This was improper, failing to give plaintiffs an opportunity to brief the issue properly.

Pleading requirements under the antitrust laws are the same as the pleading requirements for most other causes of action — "notice" is sufficient. Special or more detailed pleadings are not required. Gretener, A.G. v. Dyson-Kissner Corp., 298 F.Supp. 350 (S.D.N.Y. 1969).

Plaintiffs should have been given an opportunity to describe their § 2 claims through proper notice and an opportunity to be heard, which was denied. Plaintiffs have a meritorious claim under § 2 for "conspiracy to monopolize", which requires no allegation of market domination. Giant Paper and Film Corporation v. Albermark Paper Co., CCH Tr. Reg. Rep. ¶ 61,351 (S.D.N.Y., decided March 28, 1977); also, United States v. Consolidated Laundries Corp., 291 F.2d 563, 573 (2nd Cir. 1961), which held that only an appreciable part of the market is required to be shown.

Furthermore, there is the important new issue of the "shared monopoly" which should have been briefed in the court below, but was not because of the lack of notice to plaintiffs concerning summary judgment as to the § 2 claim. Issues such as the lack of legitimate business purpose in the parallel refusals, the newspapers' joint activities through the Better Business Bureau in establishing advertising acceptability standards for all to follow, the type of advertising itself, reviewed and permitted for use by the Securities and Exchange Commission; the relationship between the shared monopoly and conscious parallelism — and other issues — should be permitted to have full analysis, with notice to plaintiffs. But this did not occur because of the grant of the non-requested summary judgment as to the Sherman Act § 2 claim.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed in its entirety with directions

(i) to permit plaintiffs to obtain Rule 56(f) or general discovery as to the conspiracy and other antitrust issues;

(ii) to permit plaintiffs to obtain general discovery on the Investment Advisers Act issues; and

(iii) to grant plaintiffs motion for a preliminary injunction prohibiting defendant's selection and publication of tombstone advertisements for public offerings of securities allegedly "suitable" for defendant's readers and any other selective tombstone publication policy.

New York, New York
May 12, 1977

Respectfully submitted,

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§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or con
spiracy, in restraint of trade or commerce among the several States, or with
foreign nations, is declared to be illegal. Every person who shall make an
contract or engage in any combination or conspiracy declared by section
1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, o
conviction thereof, shall be punished by fine not exceeding one million do
lars if a corporation, or, if any other person, one hundred thousand dolla
or by imprisonment not exceeding three years, or by both said punish-
ments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93–528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94–145, § 2, 89 Stat. 801.

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§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93–528, § 3, 88 Stat. 1708.

§ 80b—1. Findings

Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 79z—4 of this title, and facts otherwise disclosed and ascertained, it is found that investment advisers are of national concern, in that, among other things—

(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and

(3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.

Aug. 22, 1940, c. 686, Title II, § 201, 54 Stat. 847.

§ 80b—2. Definitions

(a) When used in this subchapter, unless the context otherwise requires—

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956 which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 78c(a)(12) of this title, as exempted securities for the purposes of the Securities Exchange Act of 1934; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

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§ 80b—3. Registration of investment advisers

(a) Except as provided in subsection (b) of this section, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

(b) The provisions of subsection (a) of this section shall not apply to—

(1) any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies; or

(see amendments attached)

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(3) any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under subchapter I of this chapter.

(c) Any investment adviser, or any person who presently contemplates becoming an investment adviser, may register under this section by filing with the Commission an application for registration. Such application shall contain such of the following information, in such form and detail, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors:

(1) information in respect of—

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(E) the basis or bases upon which such investment adviser is compensated; and

(F) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section, and

(2) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser consists or is to consist of rendering investment supervisory services.

Except as hereinafter provided, such registration shall become effective thirty days after receipt of such application by the Commission, or within such shorter period of time as the Commission may determine. Any amendment of an application filed not more than fifteen days after the filing of such application shall be deemed to have been filed with and as a part of such application. Any amendment of an application filed more than fifteen days after the filing of such application and before such application becomes effective shall be deemed a new application incorporating by reference the unamended items of the earlier application. Any amendment filed after the application has become effective shall become effective thirty days after the filing thereof, or at such earlier date as the Commission may order.

(d) Any provision of this subchapter (other than subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce are used in connection therewith shall also prohibit any such act, practice, or course of business by any investment adviser registered pursuant to this section or any person acting on behalf of such an investment adviser, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(e) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, or suspend for a period not exceeding twelve months, or revoke the registration of, an investment adviser, if it finds that such censure, denial, suspension, or revocation is in the public interest and that such investment adviser or any person associated with such investment adviser, whether prior to or subsequent to becoming such—

(1) has willfully made or caused to be made in any application for registration or report filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or who has omitted to state in any such application or report any material fact which is required to be stated therein; or

(2) has been convicted within ten years preceding the filing of the application or at any time thereafter of any felony or misdemeanor which the Commission finds (A) involves the purchase or sale of any security, (B) arises out of the conduct of the business of a broker, dealer, or investment adviser, (C) involves embezzlement, fraudulent conversion, or misappropriation of funds or securities, or (D) involves the violation of section 1341, 1342, or 1343 of Title 18; or

(3) is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or an affiliated person or employee of any investment company, bank,

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or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security; or

(4) has willfully violated any provision of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of subchapter I of this chapter, or of this subchapter, or of any rule or regulation under any of such statutes; or

(5) has aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or the Securities Exchange Act of 1934, or of subchapter I of this chapter, or of this subchapter, or of any rule or regulation under any of such statutes or has failed reasonably to supervise, with a view to preventing violations of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision: *Provided*, That, for the purposes of this paragraph (5), no person shall be deemed to have failed reasonably to supervise any person, if—

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person; and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with; or

(6) is subject to an order of the Commission entered pursuant to subsection (f) of this section barring or suspending the right of such person to be associated with an investment adviser, which order is in effect with respect to such person.

(f) The Commission may, after appropriate notice and opportunity for hearing, by order censure any person or bar or suspend for a period not exceeding twelve months any person from being associated with an investment adviser, if the Commission finds that such censure, barring, or suspension is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (4), or (5) of subsection (e) of this section, or has been convicted of any offense specified in paragraph (2) of subsection (e) of this section within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (3) of subsection (e) of this section. It shall be unlawful for any person as to whom such an order barring or suspending him from being associated with an investment adviser is in effect, willfully to become, or to be, associated with an investment adviser, without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with such investment adviser without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care should have known of such order.

(g) The commencement of a proceeding to deny registration under this section shall operate to postpone the effective date of registration for a period of ninety days, or until final determination whether such registration shall be denied if that determination is made within such ninety-day period; but if, after appropriate notice and opportunity for hearing, it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration beyond such ninety-day period and until final determination of whether such registration shall be denied, the Commission shall so order. Upon request of any interested party, made more than ninety days after the effective date of such order, the Commission shall consider whether such postponement should continue, and shall take such action, if any, with respect thereto as in its discretion is necessary or appropriate in the public interest or for the protection of investors.

(h) Any successor to the business of an investment adviser registered under this section shall be deemed likewise registered hereunder, if within thirty days from its succession to such business it shall file an application for registration under this section, unless and until the Commission, pursuant to subsection (d) of this section, shall deny registration to or revoke or suspend the registration of such successor.

(i) Any person registered under this section may, upon such terms and conditions as the Commission finds necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any person registered under this section, or who has pending an application for registration filed under this section, is no longer in existence or is not engaged in business as an investment adviser, the Commission shall by order cancel the registration of such person.

Aug. 22, 1940, c. 686, Title II, § 203, 54 Stat. 850; Sept. 13, 1960, Pub. L. 86-750, §§ 2-5, 74 Stat. 885; Dec. 14, 1970, Pub.L. 91-547, § 24, 84 Stat. 1430.

§ 80b—3. Registration of investment advisers

[See main volume for text of (a) and (b)]

(c)(1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents) the Commission shall—

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

[See main volume for text of (d)]

(e) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated—

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds—

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudu-

lent conversion, or misappropriation of funds or securities; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18.

(3) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(4) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, or the rules or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(5) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph (5) no person shall be deemed to have failed reasonably to supervise any person, if—

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(6) is subject to an order of the Commission entered pursuant to subsection (f) of this section barring or suspending the right of such person to be associated with an investment adviser which order is in effect with respect to such person.

(f) The Commission, by order, shall censure or place limitations on the activities of any person associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (4), or (5) of subsection (e) of this section or has been convicted of any offense specified in paragraph (2) of said subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (3) of said subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

(g) Any successor to the business of an investment adviser registered under this section shall be deemed likewise registered hereunder, if within thirty days from its succession to such business it shall file an application for registration under this section, unless and until the Commission, pursuant to subsection (d) of this section, shall deny registration to or revoke or suspend the registration of such successor.

(h) Any person registered under this section may, upon such terms and conditions as the Commission finds necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any person registered under this section, or who has pending an application for registration filed under this section, is no longer in existence or is not engaged in business as an investment adviser, the Commission shall by order cancel the registration of such person.

As amended June 4, 1975, Pub.L. 94–29, § 29(1)–(4), 89 Stat. 166–169.

§ 80b—6. Prohibited transactions by investment advisers

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

Aug. 22, 1940, c. 686, Title II, § 206, 54 Stat. 852; Sept. 13, 1960, Pub.L. 86-750, §§ 8, 9, 74 Stat. 887.

§ 80b—8. General prohibitions

(a) It shall be unlawful for any person registered under section 80b—3 of this title to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or any officer thereof.

(b) No provision of subsection (a) of this section shall be construed to prohibit a statement that a person is registered under this subchapter or under the Securities Exchange Act of 1934, if such statement is true in fact and if the effect of such registration is not misrepresented.

(c) It shall be unlawful for any person registered under section 80b—3 of this title to represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless (1) his or its principal business consists of acting as investment adviser, and (2) a substantial part of his or its business consists of rendering investment supervisory services.

(d) It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this subchapter or any rule or regulation thereunder.

Aug. 22, 1940, c. 686, Title II, § 208, 54 Stat. 853; Sept. 13, 1960, Pub.L. 86-750, §§ 10, 11, 74 Stat. 887.

COPY RECEIVED
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